United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL BRIEF

Original with affidavit of Mailing

74-1827

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1827

UNITED STATES OF AMERICA,

Appellee,

—against—

PEDRO MORRELL and RAMON BRUZON,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR THE APPELLEE

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SUPPLEMENTAL BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

This is an appeal by appellants Pedro Morell and Ramon Bruzon from judgments of conviction which had been entered against them more than a year ago on May 10, 1974. Those judgments convicted appellants of knowingly conspiring together to distribute cocaine in violation of 21 U.S.C. §846 and with the possession of four kilograms of cocaine in violation of 21 U.S.C. §841(a)(1). Each appellant was sentenced to a term of eight years imprisonment and to a special parole term of five years. Appellants have been free on bail pending the appeal.

The appeal in this case had originally been scheduled

for oral argument during the week of September 16, 1974. Thereafter, following motions by appellants for extensions of time in which to file their briefs, the argument was adjourned to be heard the week of December 16, 1974.

During the week prior to the due date of the brief for the United States, the United States Attorney's office learned, for the first time, of the existence of a confidential file concerning the informant witness in the case, Alfredo Valdez. That file, which consisted of two separate file folders, contained material which, for the most part, had been elicited during the course of the trial either on direct or cross-examination of the witness Valdez.[1/] Notwithstanding that the material in the folders was largely cumulative of evidence which had already been made known to the appellants, this Court was quickly advised of the existence of these additional materials (see letter of December 11, 1974, SA 3).

On December 17, 1974 this Court (per Circuit Judges Friendly, Timbers and Gurfein) remanded the case to the District Court "with instructions to make appropriate

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1/ Valdez was examined twice. A first trial was aborted, following the direct case of the Government, when it was learned that several of the jurors had read a news article in The New York Times concerning the use by law enforcement agencies of informants (A. 279).

findings of fact and conclusions of law with respect to the disclosures made by the Government in its letter dated December 11, 1974 . . ." (SA 6).

On December 20, the Office of the United States Attorney made available to the District Court (Costantino, J.) and to all defense counsel redacted versions of the two file folders relating to the witness Valdez (SA 1, 7-43). In addition, we forwarded an order of the United States District Court in the Southern District of Florida, dated July 16, 1973, which terminated the witness Valdez' three year period of probation which had begun in May, 1972 (SA 44). Finally, we provided a copy of the transcript of Valdez' sentencing before District Judge W. O. Mehrtens (SA 45).

In our letter we suggested that a scheduling order be set by the District Court for the receipt of briefs in the case as well as a hearing. No such schedule was set. Nevertheless on February 7, 1975, counsel for appellants jointly submitted a lengthy letter which they characterized as a motion for a new trial based upon the materials made available by the United States. Our response was sent to the Court on March 6, and on March 14 Judge Costantino heard oral argument on appellants' motion for a new trial

as well as the subject covered by this Court's order of December 17, 1974. Following oral argument by counsel, District Court Judge Costantino determined as follows:

> After examining the material turned over to defense counsel, the materials provided to me for inspection in camera, that were not turned over to defense counsel, and the letters submitted by the Assistant U.S. Attorney and defense counsel, the Court makes the following determination:
>
> While the files contain fairly extensive information about the informant, including vouchers, reports of other non-related investigations and various other documents, this Court finds that the materials do not warrant a retrial or a determination that the defendant's right under Brady versus Maryland were violated.
>
> The first question raised is which standard of materiality should be utilized to judge the importance to defendants of newly discovered material. The lowest standard, and that is, an easier burden of proof for defendants, is to be used where the prosecutor has either deliberately suppressed information or has been grossly negligent in failing to disclose it to defense counsel. A more difficult standard for defendants is used where the conduct of the prosecutor is the product of mere negligence or inadvertence. See United States versus Kahn, 472 Fed. 2d 272 Second Circuit, 1973.
>
> Without making any findings whether the prosecutor's conduct in this case was grossly negligent or merely inadvertent, this Court holds under either standard, the relief requested by defense counsel should be denied.
>
> The information disclosed in the files is either cumulative of information already known to defense counsel at trial, and incidentally used by them to cross examine the informant, or is

irrelevant to this investigation, and therefore, inadmissible at trial.

Counsel for defendants at trial skillfully exploited the informant's character, past actions and relationship to the Government; more of the same would not have helped their cause.

Accordingly, the relief requested by defense counsel is denied. The Court would like to say that the Government should learn a lesson from this incident, care should be taken not to conceal this type of information in the future, and the failure of Agent McElroy to correct misinformation was serious error. That's the Court's determination. (SA 93-95).

ARGUMENT

The Government satisfied its obligation under Brady v. Maryland, by placing on the record the facts concerning the arrest and conviction of its main witness. The District Court, on remand, properly determined that the materials from the Valdez file were "either cumulative" or "irrelevant," and that, given defense counsel's skillful exploitation of Valdez' "character, past actions and relationship to the Government; more of the same would not have helped their cause."

In this case, appellants were convicted upon the testimony of the informant Valdez and the corroborative testimony of the agent, Scharlatt, which showed the presence of four kilograms of cocaine in their store as well as appellant Bruzon's attempted escape when the agents came into the store's basement on May 25, 1972. The so-called newly discovered evidence in this case relates solely to the impeachment of Valdez' credibility. It does not, in any sense, compromise the evidence offered by Scharlatt. Nor can the evidence outlined in the files be otherwise characterized as exculpatory. Moreover, this is not a case involving "perjury and Government suppression of information that vitally concerns the motivation of the witness, such as evidence about consideration promised him by the prosecutor for his testimony [citations omitted." United States v. Rosner, ____F.2d _____ (2d Cir. Slip op. 3245, 3252; decided April 29, 1975). In sum, the material in the file involves evidence which is "... solely of an impeaching nature..." United States v. Rosner, supra,

slip op. at 3247.

We are not at all sure, as well, that this case involves the "suppression" of evidence as that term has come to be used since Brady v. Maryland, 373 U.S. 83 (1963) was decided. Thus, while better judgment might have guided the Assistant United States Attorney to seek a brief adjournment, unearth the pieces of paper which shed light on Valdez' arrest and conviction record when it was first requested at the beginning of the second trial (A. 287-288), there is no basis in this record to suggest that the Assistant had possession of the evidence in the file, much less the file itself, and intentionally suppressed it. Moreover, the record does not admit of any conclusion other than that the Assistant believed, in good faith, that he had already elicited from the witness the relevant facts upon which the defense could have premised its attack on the witness' credibility (see generally, Point I of the main Brief for the Appellee, pp. 9-13). Accordingly, we see no basis for a claim of "suppression."

Additionally, appellants' attempts to impugn the good faith of the prosecution is belied by the fact that the existence of the confidential Valdez informant file was made known immediately and that its entire contents, with few exceptions was xeroxed and sent to counsel in short order. See United States v. Seijo, _____F.2d_____ (2d Cir. Slip op. 3039, 3051; decided April 23, 1975). Thus, on the issue of good faith, the only fragment which remains to appellants is Agent McElroy's failure to make known

the existence of the confidential file.[2] But, as will be shown, McElroy ought not to be seriously faulted when there was no evidence in the file which could reasonably have aided these appellants and which had not already been made known to defense counsel.[3] Thus, even if we are, in any sense, involved with an analysis under the Brady line of cases, it seems clear that because non-disclosure of the file was as a result of neglect, rather than prosecutorial misconduct, the higher standard of materiality articulated in the cases, United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974), United States v. Miller, 411 F.2d 825, 832, (2d Cir. 1969), is required. As this Court noted in United States v. Pfingst, 490 F.2d 262, 277 (2d Cir.), cert. denied, 417 U.S. 919 (1973), "... the mere existence of undisclosed evidence, even following a request, does not alone compel a new trial under Brady." At worst, then, we believe that this appeal is in that class of cases in which the prosecutor's file has been combed and evidence has been found which is "possibly useful to the defense but not likely to have

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2/ Although McElroy was generally present during the trial, the record does not show that he was present when counsel for appellant Morell requested the "arrest record" of Valdez (A. 287). Indeed, if McElroy had been present, it would have been relatively easy for Judge Costantino to simply direct McElroy to turn over the arrest record. No such direction was made and, indeed, Judge Costantino never replied to defense counsel's suggestion that it was "incumbent" upon the Assistant to obtain a copy of Valdez' plea (A. 288). Under those circumstances, one could hardly expect McElroy - even if he were present - to outdo the Court, particularly when the file contained neither an FBI "rap sheet" nor the minutes of Valdez' plea.

3/ As noted in Rosner, supra, at 3644, n 4, the doctrine of imputability is stretched "too far" when the prosecutor is bound by another government employee who inadvertantly fails to recognize "the importance of an item suitable for impeachment purposes in relation to a specific trial."

changed the verdict." United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968).[4/]

Against this background, appellants, in their joint suppelmental brief, claim that the information made available to them from the Valdez files would have corroborated their specific contention that the cocaine found in their store belonged to Valdez and Urbano Ramos an further tended to generally establish that Valdez was not a credible witness. That additional information consisted, according to appellants (Supp. Br., 3), of the following:

1. That Valdez was sentenced on May 18, 1972, and not in 1970 or 1971 as he had recollected

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4/ We also note the following statement in Rosner, supra, at 3265:

> Perjury by a government witness, unknown to the prosecution, does not ordinarily compel the application of standards for a new trial required in cases of Government misconduct. United States v. Marquez, 363 F. Supp. 802 (S.D.N.Y. 1973), aff'd on opinion below, 490 F.2d 1383 (2d Cir. 1974); United States v. DeSapio, 435 F.2d 272, 286 n. 14 (2d Cir. 1970), cert. denied, 402 U.S. 999 (1971).

Moreover, "misconduct" sufficient to invoke the lesser standard of materiality outlined in United States v. Kahn, 472 F.2d 272, 287 (2d Cir.) cert. denied, 411 U.S. 982 (1973), is not spelled out simply because one member of a prosecution team "must have been aware how useful to the defense" a particular item of information "would have been." United States v. Sperling, supra, 506 F.2d at 1333.

and testified at trial;

2. That Valdez' probation was "supposedly" conditioned on his continued cooperation;

3. That in contrast to all previous cases in which he worked as an informant, Valdez did not introduce appellants to an undercover agent;

4. That the Government obtained an early termination of his probation (in July, 1973); and

5. That the DEA interceded on behalf of Valdez' wife so that she could remain in the United States while Valdez concluded his work for the Government.

Following his review of the file folders and after hearing extensive argument, District Judge Costantino, who had presided at the two trials in this case,[5/] determined that "[t]he information disclosed in the files is either cumulative of information already known to defense counsel at trial, and incidentally used by them to cross examine the informant, or is irrelevant to this investigation, and therefore, inadmissible at trial" (SA 94).

5/ As to the standard of review in this Court of Judge Costantino's findings, United States v. Johnson, 327 U.S. 106, 111 (1945) makes it clear that they must be upheld unless it clearly appears that they "are not supported by evidence."

Judge Costantino further found that "[c]ounsel for defendants at trial skillfully exploited the informant's character, past actions and relationship to the Government; more of the same would not have helped their cause."[6/]

We do not dispute that Valdez mistakenly testified at trial that he had been sentenced in 1970 or 1971 rather than in 1972. His testimony on that score, admittedly, was uncertain. It was not, however, perjurious. Thus, he correctly remembered and testified that he had received a sentence of three years probation. And, considering that his probation was terminated in 1973, it would not have been unlikely for him to believe almost two years later that he had been sentenced at around the same time that he had pleaded guilty. But Valdez never went so far as to testify that he was sentenced in a particular year. He continually testified at the trial that he could not remember when he was sentenced (A. 355). It was only when counsel pressed him, on the assumption that he was sentenced a year after he pleaded guilty that it was further assumed that he was sentenced in 1971 (A. 355-356).

Under these circumstances, we cannot understand a claim of perjury. Moreover, had the file been available and Valdez'

6/ In making these findings and determining that appellants were not entitled to a new trial, Judge Costantino applied the standard suggested in United States v. Kahn, supra, 472 F.2d at 287 i.e., that where evidence is deliberately suppressed by the Government a new trial is warranted if the evidence is material or favorable to the defense.

recollection refreshed the defense would have suffered; not the prosecution. Thus, the file would have shown that, although Valdez was sentenced in the midst of this investigation (in contrast to his trial recollection that he was not), he had been released from probation in 1973. Accordingly, defense counsel was allowed to argue to the jury (in March, 1974) that Valdez "got three years probation... in May of 1971 and since we can all add, we can now understand that he is still under the thumb of the Government" (A. 603). Surely, that argument was more valueable for impeachment purposes than a meaningless assertion that Valdez was sentenced in the midst of this investigation.

Thus, whatever effect these factors may have had on Valdez' decision to work as an informant for the Government in 1972 ad 1973, they would have had little if any effect on his testimony in 1974. As noted by one Court: "Bias is a state of mind, and only these events which can influence the mind at the moment of testifying are relevant to a demonstration of bias [footnote omitted]." Austin v. United States, 418 F.2d 456, 458-459 (D.C. Cir. 1969). At the time of his trial testimony, Valdez had nothing either to gain or to fear from testifying. His debt to the Government was paid. He was no longer on probation and was living in Central America (A. 315). Nothing in the trial record of the information in the files suggests that his trial testimony was provided in return for the expectation of any favors or the fear of any punishment. The fact that his wife may have been

permitted to reside in the country while he testified in the past, that he received an early termination of probation, or that the Government may have interceded with the Judge in his behalf, was all past history and provided no significant motivation for his testimony at the time of trial in 1974. This case is therefore distinguishable from those cases cited by appellants in which the newly disclosed material had a significant effect on the motivation of the witness to testify at trial.[7/]

Appellants' additional argument concerning newly disclosed information on Valdez' modus operandi in the other cases on which he worked is frivolous. First of all, appellants have advanced no theory under which they would have been entitled at any time to disclosure of the facts of unrelated cases on which an informant worked. Their argument as to the so-called value of this information is entirely contrived assuming as it does, that the trial court would have allowed cross-examination as to such wholly collateral matters. See United States v. Miles, 480 F.2d 1215 (2d Cir. 1973); United States v. Marks, 368 F.2d 566, 567 (2d Cir. 1966), cert. denied, 386 U.S. 933 (1967). In addition, we note that defense counsel was on full notice of Valdez' past cases but

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7/ United States v. Fried, 486 F.2d 201 (2d Cir. 1973) cert. denied, 416 U.S. 983 (1974), (a Government witness was the subject of any undisclosed indictment pending at the time of the trial); United States v. Badlamente, 507 F.2d 12 (2d Cir. 1974), (an undisclosed letter written to the District Court Judge wherein the witness indicated he was being harrassed and pressured by the United States Attorney's Office; United States v. Houle, 490 F.2d 167, (2d Cir. 1973), cert. denied, 417 U.S. 970 (1974) (failure to disclose conversation between prosecutor and witness concerning pending criminal charges against the witness).

refused to air them before the jury (A. 6-7; see also, A. 67, A. 194).

With respect to Valdez' response that he did not know whether or not the United States Attorney or the Federal Agents advised the sentencing Judge of his cooperation before he was sentenced to three years probation, nothing contained in the files suggests that his answer was false. Although it is clear that the Judge was advised of Valdez' cooperation in some fashion, the transcript of his sentencing does not reflect that this was done orally in Valdez' presence. Thus, Valdez, as he in essence testified, did not have direct knowledge of statements made on his behalf. See Gordon v. United States, 344 U.S. 414, 422 (1953).

In this case Valdez' testimony was hardly the sole evidence of defendants' guilt but was overwhelmingly corroborated by the discovery of four kilograms of cocaine on defendants' premises in their presence. The effect of even substantial impeachment evidence, much less the speculative variety discussed by defendants, would not justify a new trial. Moreover, Valdez' criminal record and his cooperation with the Government was brought to the attention of the jury at trial. He was not represented as a patriotic citizen willing to do this part to put an end to drug trafficking in this country. Under these additional circumstances, given the nature of the nondisclosure, the corroborative evidence of these appellant's guilt, and the full opportunity of the jury "to make a 'discriminating appraisal of a witness' motives and bias United States v Lipton, 467 F.2d 1161, 1166 (2d Cir. 1972) cert. denied, 410 U.S.

927 (1973), quoting from United States v. Campbell, 426 F.2d 547, 550 (2d Cir. 1970), we see no basis to reverse these convictions.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: July 2, 1975

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of July 19 75 he served two copies of the within

Supplemental Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Santangelo & Santangelo, Esqs.
253 Broadway
New York, N. Y. 10007

Barry Ivan Slotnick, Esq.
233 Broadway
New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

3rd day of July 19 75

Irene Cohen (Bevilacqua)

IRENE B. COHEN (BEVILACQUA)
Notary Public, State of New York
No. 24-0683965
Qualified in Kings County
Commission Expires March 30, 1977